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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/803,126	03/17/2004	James Robert Schwartz	9183M&	4865

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EXAMINER

ARNOLD, ERNST V

ART UNIT	PAPER NUMBER
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1616

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	04/27/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

<p align="center">Office Action Summary</p>	<p>Application No.</p> <p align="center">10/803,126</p>	<p>Applicant(s)</p> <p align="center">SCHWARTZ ET AL.</p>	
	<p>Examiner</p> <p align="center">Ernst V. Arnold</p>	<p>Art Unit</p> <p align="center">1616</p>	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 12 February 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-4, 8, 9, 11, 12 and 14-27 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-4, 8, 9, 11, 12 and 14-27 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| <p>1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)</p> <p>2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)</p> <p>3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
 Paper No(s)/Mail Date _____.</p> | <p>4) <input type="checkbox"/> Interview Summary (PTO-413)
 Paper No(s)/Mail Date. _____.</p> <p>5) <input type="checkbox"/> Notice of Informal Patent Application</p> <p>6) <input type="checkbox"/> Other: _____.</p> |
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DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 2/12/07 has been entered.

Claims 5-7, 10 and 13 have been cancelled. Claims 1-4, 8, 9, 11, 12 and 14-27 are pending.

Withdrawn rejections:

Claims 1-4, 8, 9, 11, 12, 14, and 17 were rejected under 35 U.S.C. 102(b) as being anticipated by Gavin et al. (WO 01/00151). Applicant has argued that zinc carbonate is known as ZnCO_3 by one of ordinary skill in the art and not $\text{Zn}_5(\text{OH})_6(\text{CO}_3)_2$ which is basic zinc carbonate and only commercial sources refer to basic zinc carbonate as zinc carbonate (See instant specification page 5, lines 16-20). The Examiner is withdrawing the rejection with respect to claims 1-4, 8, 9, 11, 12, 14, and 17 because Gavin et al. do not disclose the source of the zinc carbonate.

Claim 22 was rejected under 35 U.S.C. 102(b) as being anticipated by Biener (US 4,943,432). Biener does not disclose the instant amount of basic zinc carbonate and the Examiner withdraws the rejection.

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Claim 22 was rejected under 35 U.S.C. 102(b) as being anticipated by Cilley et al. (US 4,933,101). Cilley et al. to not disclose forming from about 0.001 wt% to about 10 wt% of basic zinc carbonate. The Examiner withdraws the rejection.

Claims 18-21 were rejected under 35 U.S.C. 103(a) as being unpatentable over Gorman (US 4,161,526) in view of Daley (US 3,960,782). Upon further consideration, the Examiner is withdrawing this rejection in favor of a new rejection.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 14 recites the limitation "ZPT" in line 1. There is insufficient antecedent basis for this limitation in the claim. "ZPT" is not recited in claim 1. Appropriate correction is required. The Examiner will examine the claim as it reads on a pyrrhithione.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 15, 16, 21 and 23-25 remain/are rejected under 35 U.S.C. 102(b) as being anticipated by Gavin et al. (WO 01/00151) as evidenced by the Mineral Willemite.

The Examiner sought guidance from the specification on the definition of a zinc-containing layered material. Applicant defines a zinc-containing layered material (Page 4, lines 24-29) as:

Many ZLM's occur naturally as minerals. Common examples include hydrozincite (zinc carbonate hydroxide), basic zinc carbonate, aurichalcite (zinc copper carbonate hydroxide), rosasite (copper zinc carbonate hydroxide) and many related minerals that are zinc-containing. Natural ZLM's can also occur wherein anionic layer species such as clay-type minerals (e.g., phyllosilicates) contain ion-exchanged zinc gallery ions. All of these natural materials can also be obtained synthetically or formed in situ in a composition or during a production process.

Gavin et al. disclose a topical anti-dandruff composition for treating microbes comprising from 0.001 to 10% zinc pyrithione; from 0.001 to about 10% of a zinc salt and an anionic deterative surfactant for a topical carrier thus reading on instant claims 15 and 16 (Claim 1). Thus if 10% zinc salt is present and 1% zinc pyrithione then a ratio of 10:1 is obtained. The zinc salt can be zinc silicate, which is also known as the mineral willemite and reads on instant claim 15 (Claim 6). Since Applicant teaches that a non-limited list of natural minerals containing zinc can also be obtained synthetically or formed in situ and Gavin et al. disclose zinc silicate, which has the same common formula for the mineral Willemite, then the zinc silicate of Gavin et al. would inherently be the same augmentation factor as instantly claimed. Gavin et al. disclose aqueous antimicrobial shampoo compositions containing zinc salt and zinc pyrithione and claim a shampoo composition comprising mixtures of zinc carbonate, zinc oxide, zinc hydroxide, cuprous ammonium carbonate, etc... thus anticipating instant claim 21 which recites a personal care composition comprising water, pyrithione, a zinc compound and a carbonate salt other than basic zinc carbonate (See examples 3-13 page 57-58 and

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claim 6). Methods pertaining to treating microbial infections preferably related to dandruff and treating athlete's foot, a contagious fungal infection, are provided hence anticipating instant claims 23-25 (Claim 9).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1-4, 8, 9, 11, 12, 14-17 and 23-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Iwai et al. (EP 1145707A1) in view of Gavin et al. (WO 01/00151).

Applicant claims a composition comprising a pyrithione and hydroxyl-containing basic zinc carbonate and methods of treating microbial infections and dandruff.

Determination of the scope and content of the prior art
(MPEP 2141.01)

The reference of Gavin et al. is discussed in detail above and that discussion is hereby incorporated by reference.

Iwai et al. teach compositions for external use comprising: 0.01-20 wt% of a zinc compound, such as basic zinc carbonate ($\text{Zn}_5(\text{OH})_6(\text{CO}_3)_2$); 0.01-20 wt% of a thiol compound; and an anionic surfactant (Claims 1, 2, 4, 6 and 7 and page 8 lines 4 and 46 bridging page 9 line 9, for example). It is the Examiner's position that the basic zinc carbonate taught by Iwai et al. would have the same level of augmentation factor (claims 1-3) in the absence of evidence to the contrary.

Ascertainment of the difference between the prior art and the claims
(MPEP 2141.02)

1. Iwai et al. do not expressly teach a composition wherein the thiol compound is pyrithione.

2. Iwai et al. do not expressly teach a method of treating microbial infections, fungal infections or dandruff with the composition.

Finding of prima facie obviousness

Rational and Motivation (MPEP 2142-2143)

1. It would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to add zinc pyrithione, as suggested by Gavin et al., to the composition of Iwai et al. and produce the instant invention.

One of ordinary skill in the art would have been motivated to do this because Iwai et al. suggest adding thiol compounds to the composition but not specifically pyrithione and Gavin et al. cure this deficiency by teaching that zinc pyrithione is suitable for external compositions.

2. It would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to use the composition of Iwai et al. in a method of treating microbial and fungal infections as well as dandruff, as suggested by Gavin et al., and produce the instant invention.

One of ordinary skill in the art would have been motivated to do this because Iwai et al. suggest the composition is useful for external use but not for those methods instantly claimed and Gavin et al. cure this deficiency by providing the teaching on the types of methods such a composition is useful for.

A reference is good not only for what it teaches by direct anticipation but also for what one of ordinary skill in the art might reasonably infer from the teachings. (*In re Opprecht* 12 USPQ 2d 1235, 1236 (Fed Cir. 1989); *In re Bode* 193 USPQ 12 (CCPA) 1976).

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In light of the forgoing discussion, the Examiner concludes that the subject matter defined by the instant claims would have been obvious within the meaning of 35 USC 103(a).

From the teachings of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention. Therefore, the invention as a whole was *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in the absence of evidence to the contrary.

Claim Rejections - 35 USC § 103

Claims 1-4, 8, 9, 11, 12, 14-17 and 23-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gavin et al. (WO 01/00151) in view of Bhat et al. (WO 96/25913 IDS number 11 filed on 10/28/2004).

Applicant claims a composition comprising a zinc-containing layered material, a surfactant and pyrithione and methods of treating microbial infections and dandruff.

Determination of the scope and content of the prior art

(MPEP 2141.01)

The reference of Gavin et al. is discussed in detail above and that discussion is hereby incorporated by reference.

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Bhat et al. teach personal care product compositions comprising a surfactant and monophasic zinc hydroxycarbonate in an amount of 0.1-20 % by weight (Claims 1 and 2). The structure of the zinc compound is $Zn_5(OH)_6(CO_3)_2 \cdot X H_2O$ where X varies between 0 and 4 (Page 6, lines 23-27). When $X=0$ then the same formula for basic zinc carbonate as disclosed by Applicant is taught (see instant specification page 6, line 6). It is the Examiner's position that the basic zinc carbonate taught by Bhat et al. would have the same level of augmentation as instantly claimed (claims 1-3) in the absence of evidence to the contrary.

Ascertainment of the difference between the prior art and the claims

(MPEP 2141.02)

Gavin et al. do not expressly teach a composition wherein the zinc salt is a zinc layered material such as basic zinc carbonate.

Finding of prima facie obviousness

Rational and Motivation (MPEP 2142-2143)

It would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to add basic zinc carbonate, as suggested by Bhat et al., to the composition of Gavin et al. and produce the instant invention.

One of ordinary skill in the art would have been motivated to do this because Gavin et al. broadly teach adding zinc salts, including the mineral zinc silicate, to the composition but not other zinc layered materials instantly claimed. Bhat et al. cure this

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deficiency by teaching that basic zinc carbonate is suitable for personal care compositions. Moreover, Bhat et al. teach the antimicrobial properties of basic zinc carbonate which would aid the topical composition of Gavin et al. for treating microbes (Abstract and claim 7).

A reference is good not only for what it teaches by direct anticipation but also for what one of ordinary skill in the art might reasonably infer from the teachings. (*In re Opprecht* 12 USPQ 2d 1235, 1236 (Fed Cir. 1989); *In re Bode* 193 USPQ 12 (CCPA) 1976).

In light of the forgoing discussion, the Examiner concludes that the subject matter defined by the instant claims would have been obvious within the meaning of 35 USC 103(a).

From the teachings of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention. Therefore, the invention as a whole was *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in the absence of evidence to the contrary.

Claim Rejections - 35 USC § 103

Claims 18-22, 26 and 27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gorman (US 4,161,526) in view of Sakuma et al. (US 2003/0044471).

Determination of the scope and content of the prior art
(MPEP 2141.01)

Gorman discloses a skin cleansing and antidandruff shampoo composition comprising zinc pyrithione, water, an alcohol and 0.01 to about 1 percent of a zinc salt such as zinc hydroxide or zinc oxide (Column 2, lines 23-51 and claim 1). Gorman discloses a method to make the composition where the additional zinc component was added in a separate step to the zinc pyrithione/water/alcohol composition and the result produced a much better looking product (Column 2, lines 41-51). Zinc hydroxide may be used in the composition (Column 2, lines 7-9 and claims 1 and 4).

Sakuma et al. teach antibacterial compositions for use in external preparations for skin, cosmetics and toiletry compositions (Abstract and page 3, lines 1-3). Sakuma et al. teach compositions and methods of making the compositions by mixing 1.0 g sodium carbonate with 9.0 g zinc oxide (page 3, [0050]; and claims 1-3). The content of the alkali metal salt is 0.5 to 75 % by weight of the total of antibacterial/antifungal agent (claim 2). Sakuma et al. teach mixing the composition with other compositions to provide antibacterial/antifungal properties (page 9, [0147]).

Ascertainment of the difference between the prior art and the claims
(MPEP 2141.02)

Gorman does not expressly disclose the process where the addition of a bicarbonate/carbonate salt to the composition that would react in-situ with the zinc salt to produce basic zinc carbonate within a range of between about 1:10 and about 10:1 or forming basic zinc carbonate in an amount from about 0.001 wt% to about 10 wt% or the narrower ranges of about 0.01 wt% to about 7 wt% or about 0.1 wt% to about 5 wt%.

Finding of prima facie obviousness
Rational and Motivation (MPEP 2142-2143)

It would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to modify the composition of Gorman by adding the sodium carbonate/zinc oxide composition, as suggested by Sakuma et al., to produce the instant invention.

One of ordinary skill in the art would have been motivated to do this because both references teach cosmetic/toiletry antibacterial/antifungal compositions and "It is prima facie obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose.... [T]he idea of combining them flows logically from their having been individually taught in the prior art." In re Kerkhoven, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980) A reference is good not only for what it teaches by direct anticipation but also for what one of ordinary skill in the art might reasonably infer from

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the teachings. (*In re Opprecht* 12 USPQ 2d 1235, 1236 (Fed Cir. 1989); *In re Bode* 193 USPQ 12 (CCPA) 1976).

Given that Gorman teaches an upper value of 1 % zinc salt then an equivalent amount of basic zinc carbonate, dependent on the amount of carbonate added, could be formed and thus read on claims 22, 26 and 27. The Examiner notes that instant claim 18 only requires that the carbonate and the zinc salt are reacted to form the basic zinc carbonate.

From the teachings of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention. Therefore, the claimed invention, as a whole, would have been prima facie obvious to one of ordinary skill in the art at the time the invention was made, because every element of the invention and the claimed invention as a whole have been fairly disclosed or suggested by the combined teachings of the cited references.

Claim Rejections - 35 USC § 103

Claims 22, 26 and 27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sakuma et al. (US 2003/0044471).

Applicant claims a process for preparing a personal care composition comprising hydroxyl containing basic zinc carbonate.

Determination of the scope and content of the prior art

(MPEP 2141.01)

Sakuma et al. teach antibacterial compositions for use in external preparations for skin, cosmetics and toiletry compositions (Abstract and page 3, lines 1-3). Sakuma et al. teach compositions and methods of making the compositions by mixing 1.0 g sodium carbonate with 9.0 g zinc oxide (page 3, [0050]; and claims 1-3). The content of the alkali metal salt is 0.5 to 75 % by weight of the total of antibacterial/antifungal agent (claim 2). Sakuma et al. teach mixing the composition with other compositions to provide antibacterial/antifungal properties (page 9, [0147]).

Ascertainment of the difference between the prior art and the claims

(MPEP 2141.02)

1. Sakuma et al. do not expressly teach a process that causes in situ formation of basic zinc carbonate in an amount from about 0.001 wt% to about 10 wt% or the narrower ranges of about 0.01 wt% to about 7 wt% or about 0.1 wt% to about 5 wt%.
2. Sakuma et al. do not expressly teach a personal care composition selected from the group consisting of shampoo, soap or skin care medicament.

Finding of prima facie obviousness

Rational and Motivation (MPEP 2142-2143)

1. It would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to perform a process that causes in situ formation of basic zinc carbonate in an amount from about 0.001 wt% to about 10 wt% or the narrower

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ranges of about 0.01 wt% to about 7 wt% or about 0.1 wt% to about 5 wt%, as suggested by Sakuma et al., and produce the instant invention.

One of ordinary skill in the art would have been motivated to do this because Sakuma et al. teach adding the same ingredients as instantly claimed which would react to produce basic zinc carbonate. The amount of basic zinc carbonate produced would be dependent on the amount of ingredients and Sakuma et al. provide a wide ratio (0.5 to 75%) of components (page 3, [0045]). It is then merely a matter of routine optimization by one of ordinary skill in the art to arrive at the instantly claimed amounts of basic zinc carbonate.

2. It would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to perform the process of Sakuma et al. to make a personal care composition selected from the group consisting of shampoo, soap or skin care medicament and produce the instant invention.

One of ordinary skill in the art would have been motivated to do this because Sakuma et al. teach external preparations for the skin which reads on soap and skin care medicaments, especially in view of the antibacterial properties, as well as toiletry goods and cosmetic which read on shampoos.

A reference is good not only for what it teaches by direct anticipation but also for what one of ordinary skill in the art might reasonably infer from the teachings. (*In re Opprecht* 12 USPQ 2d 1235, 1236 (Fed Cir. 1989); *In re Bode* 193 USPQ 12 (CCPA) 1976).

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In light of the forgoing discussion, the Examiner concludes that the subject matter defined by the instant claims would have been obvious within the meaning of 35 USC 103(a).

From the teachings of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention. Therefore, the invention as a whole was *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in the absence of evidence to the contrary.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1, 8, 9 and 23-25 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-3, 5, 17 and 23-24 of copending Application No. 10/802,166. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims of the instant invention embrace or are embraced by the claims in the co-pending application as is shown in the claims analysis table below.

Instant Application 10/803,126	Common claim elements	Copending Application 10/802,166 (03/17/2004)
1	Zinc-containing layered material; metal salt of pyrithione	1 and 2
1 and 8	Zinc-containing material is basic zinc carbonate	1, 2 and 17
1 and 9	Zinc pyrithione	1-3
1, 2 and 23	Method of treating microbial infections	1 and 23
1, 2 and 24	Method of treating fungal infections	1 and 24
1, 2 and 25	Method of treating dandruff	1 and 25

One of ordinary skill in the art would have recognized that the composition comprising a zinc-containing layered material; a surfactant; and a metal salt of pyrithione is encompassed by the composition of the co-pending application comprising a metal salt of pyrithione and a zinc-containing layered material. Since the compositions are the same then the compositions are would inherently have the same characteristics including lability of the zinc. The addition of anionic surfactants to zinc pyrithione dandruff shampoos has been suggested by Bowser et al. (US 5,723,112) (Abstract; column 3, lines 19-41 and claims 1-8, for example). The selection of surfactants (i.e.,

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surfactants with anionic functional groups) is deemed merely a matter of judicious selection and routine optimization, which is well within the purview of one of ordinary skill in the art. The comprising language of the instant invention does not preclude the addition of surfactants with anionic functional groups. This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Response to arguments:

Applicant asserts that relative zinc lability and augmentation are two distinct components. The Examiner cannot agree. The same material, basic zinc carbonate, is disclosed by Applicant to have both of these properties. Thus, these features are inherent in basic zinc carbonate and would be present no matter where basic zinc carbonate might be.

Conclusion

No claims are allowed.

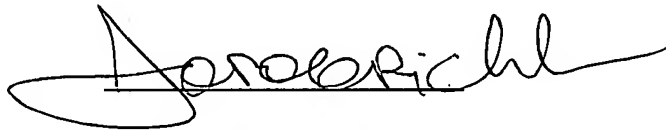
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Ernst V. Arnold whose telephone number is 571-272-8509. The examiner can normally be reached on M-F (6:15 am-3:45 pm).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Johann Richter can be reached on 571-272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Ernst Arnold
Patent Examiner
Technology Center 1600
Art Unit 1616

A handwritten signature in black ink, appearing to read "Johann Richter", with a large, stylized flourish at the end.

Johann Richter, Ph.D. Esq.
Supervisory Patent Examiner
Technology Center 1600